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Supreme Court of the United States

October Term, 1976

No. 76-577

HUGO ZACCHINI,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Table of Authorities II

Question Presented 1

Relevant Constitutional Provision Which Was Not Reproduced By Petitioner 2

Counterstatement of the Case 2

Summary of Argument 4

Argument 6

I. Introduction 6

II. This Case Should Be Dismissed For Want of a Federal Question 9

A. The Ohio Supreme Court decision rests on adequate and independent state grounds 9

B. In defining the scope of common law rights the Ohio Supreme Court may look for guidance to decisions of this Court 13

C. Any decision by this Court on the merits would constitute merely an advisory opinion 15

III. The News Media Privilege Recognized By the Ohio Supreme Court Is Neither Novel, Unreasonable Nor Inconsistent With Federal Constitutional Principles 18

A. The privilege afforded the press by the Ohio Supreme Court is consistent with the news media privilege traditionally recognized in Ohio and other jurisdictions 18

B. The privilege applied by the Ohio court is consistent with First Amendment principles articulated by this Court 21

C. The Ohio court did not totally immunize the press from right of publicity claims 24

IV. Any Remand For Further Proceedings in This Case Must Be to the Ohio Supreme Court 26

Conclusion 28

TABLE OF AUTHORITIES

Cases

AAFCO Heating and Air Conditioning Company v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976) 14-15, 27

American Ry. Express Co. v. Kentucky, 273 U.S. 269 (1927) 10

Beck v. Ohio, 379 U.S. 89 (1964) 12

Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967) 5, 12

Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569 (1975) 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 21

Current Audio, Inc. v. RCA Corp., 71 Misc. 2d 831, 337 N.Y.S.2d 949 (S. Ct. 1972) 20

Dept. of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965) 11, 27

Ellis v. Dixon, 349 U.S. 458 (1955) 11

Fairport, Painesville & Eastern R.R. Co. v. Meredith, 292 U.S. 589 (1934) 10, 11

Garrison v. Louisiana, 379 U.S. 64 (1964) 24

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 5, 7, 14, 15, 21, 22, 27

Herb v. Pitcairn, 324 U.S. 117 (1945) 5, 16

In re Royall, 125 U.S. 696 (1888) 26

Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965) 12

Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d. Cir.), *cert. denied*, 357 U.S. 921 (1958) 23

Johnson v. Scripps Publishing Co., 32 Ohio L. Abs. 423, 18 Ohio Op 372 (C.P. 1940) 4, 19

Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Marketing Ass'n, 276 U.S. 71 (1928) 11

Liles v. Gaster, 42 Ohio St. 631 (1885) 25

Man v. Warner Bros., Inc., 317 F. Supp. 50 (S.D.N.Y. 1970) 17, 20

Martin v. F.I.Y. Theatre Co., 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (C.P. 1938) 4, 18

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 27

Murdock v. Memphis, 87 U.S. 590 (1874) 15

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 13, 14, 18, 21

Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (S. Ct. 1968) 20

Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 547 P.2d 1074 (1976) 15

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1951) 12

Regents of Univ. System of Georgia v. Carroll, 338 U.S. 586 (1950) 11

Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S.2d 122 (S. Ct. 1968), *aff'd*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969) 19, 20

Rosenblatt v. Baer, 383 U.S. 75 (1966) 22

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 14, 15

Southern Ry. Co. v. Kentucky, 284 U.S. 338 (1932) 26

Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975) 15

Time, Inc. v. Hill, 385 U.S. 374 (1967) 7, 13, 14, 21

Torski v. Mansfield Journal Co., 100 Ohio App. 538, 137 N.E.2d 679 (1956) 25

Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo.) *cert. denied*, 423 U.S. 1025 (1975) 14

Young v. That Was The Week That Was, 312 F. Supp. 1337 (N.D. Ohio 1969) 4

Zacchini v. Scripps-Howard Broadcasting Company, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976) 4, 9, 13, 14, 18, 24, 25

Texts

36 C.J.S. *Federal Courts* §268 (1960) 10

14A F. Poore, CYCLOPEDIA OF FEDERAL PROCEDURE, §69.77 (3d ed. 1965) 26

Note, 62 COLUM. L. REV. 822 (1962) 27

14 OHIO JUR. 2d *Courts* §247 (1955) 5

34 OHIO JUR. 2d *Libel and Slander* §58 (1958) 25

Constitutions and Statutes

Ohio Constitution, Article I, Section 11 ..... 2, 4

United States Constitution, First Amendment 1, 5, 6, 7, 8, 12, 13, 15, 16, 21, 22

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ON WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether, in a case of first impression which recognizes a new common law right of publicity, the Ohio Supreme Court, without federal intervention, may recognize a news media privilege to report on a matter of public interest which affords the protection required by the First Amendment as interpreted by the United States Supreme Court.

RELEVANT CONSTITUTIONAL PROVISION WHICH WAS NOT REPRODUCED BY PETITIONER

Constitution of Ohio — Article I, Section 11:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case summarizes both the facts of the case and the proceedings to date. While Petitioner's summary is essentially accurate, certain undisputed facts relevant to the decision of the Ohio Supreme Court are not fully stated. These facts are as follows:

In August and September of 1972, Petitioner Hugo Zacchini regularly performed his "human cannonball" act for members of the general public attending the Geauga County Fair, in Burton, Ohio (App. pp. 9-10). His performance lasted about fifteen seconds, during which he was projected out of a cannon-like object into a net some two hundred feet away (App. p. 9). No separate admission fee was charged to view his act and his performance was staged in an open grandstand area for the benefit of all persons in general attendance at the fair (App. p. 9). Reporters and news cameramen were admitted to the fair *without charge* by the fair's promoters so that the fair would receive publicity from the news coverage (App. p. 10). The promoters to whom Petitioner sold his act

made no effort to restrict news coverage of Respondent's act; in fact, by admitting reporters and cameramen free of charge, the promoters encouraged such coverage (App. p. 10).

On September 1, 1972, a freelance news reporter for Respondent attended the Geauga County Fair and filmed Petitioner's performance over his verbal objection (App. p. 10). Petitioner's act had generated substantial public interest at the fair and, in keeping with Respondent's commitment to present a broad range of news and information to the public, Respondent determined that activities at the fair, including the public performance of Petitioner's act, would be of interest to its viewers and would call the public's attention to the fair's attractions (App. p. 10).

Respondent broadcast a fifteen second news film clip of Petitioner's act *once* on its eleven o'clock Eyewitness News program on September 1, 1972 (App. p. 11). While the film clip was being shown newscaster David Patterson described the act as follows:

> This . . . now . . . is the story of a *true spectator* sport . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . . (App. p. 12) (emphasis in original script).

This single news use of a fifteen second film clip of Petitioner's performance is the sole basis for Petitioner's claim against Respondent.

SUMMARY OF ARGUMENT

The decision of the Ohio Supreme Court in this case is one of state law. The Ohio Supreme Court held for the first time that under the common law of Ohio a "performer of a 'human cannonball' act has a right in the publicity value of his performance, and the appropriation of that right over his objection *without license or privilege* is an invasion of his privacy." *Zacchini v. Scripps-Howard Broadcasting Company*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976) (syllabus 2) (emphasis added). In recognizing the "right of publicity", the Ohio Supreme Court simultaneously applied a concomitant news media privilege as a defense to that right. This privilege was stated as follows:

> A TV station has a privilege to report in its newscast matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual. *Id.* at 224, 351 N.E.2d at 455 (syllabus 3).

This privilege is one of state law, not federal constitutional law. It is an extension of the state constitutional and common law privilege afforded the news media in Ohio in right of privacy cases since as early as 1938. OHIO CONSTITUTION, art. I, §11; *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (C.P. 1938); *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 18 Ohio Op. 372 (C.P. 1940). *See also Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969). In articulating this privilege, the Ohio Supreme Court looked to the rationale behind the decisions of this Court for guidance. Nevertheless, the right of the performer and the privilege of the news media as set forth in the syllabi

of the Court[1] constitute the decision of Ohio's highest court as to the extent of protection to be afforded both performers and the news media under the laws of Ohio. Since adequate and independent nonfederal grounds for the Ohio court's ruling exist, a review of the decision by this Court would be inappropriate. *Herb v. Pitcairn*, 324 U.S. 117 (1945).

This Court has previously recognized that state courts are free to afford protection to the press provided such protection meets minimum federal constitutional standards. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Thus the Ohio Supreme Court is free to recognize a new common law right and to adopt, as an integral part of that right, privileges and defenses emanating from state common law and state and federal free press guarantees so long as the privileges and defenses meet minimum federal standards.

A decision by this Court on the merits of the federal constitutional question proffered by Petitioner would constitute only an advisory opinion to the Ohio Supreme Court. While Petitioner has asked this Court to intervene and announce specific federal standards which must apply to right of publicity claims arising under state law, the articulation of such standards under the facts of this case would be highly inappropriate. Only when a state supreme court in creating common law (i) fails to meet the minimum constitutional protections which must be accorded the press under the First Amendment and (ii) grants recovery against the media, should this Court, in the exercise of federal question jurisdiction, intervene to define and apply those minimum constitutional standards.

In this case, the privilege afforded the press by the

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[1] The syllabus of the Ohio Supreme Court is the official pronouncement of the court. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967); 14 OHIO JUR. 2d *Courts* §247 (1955).

Ohio Supreme Court is consistent with the privilege traditionally applied in right of privacy cases arising in Ohio and other jurisdictions. It is furthermore grounded upon the same free press concerns which this Court has long considered to be so fundamentally important to our free society. If this Court, despite the absence of federal question jurisdiction, elects to advise the Ohio Supreme Court on the minimum privilege required under the federal Constitution, Respondent submits that under the First Amendment the news media is privileged to make news use of matters of public interest which, under state law, might otherwise be protected by an individual's right of publicity.[2]

ARGUMENT

I. Introduction.

In this case the Ohio Supreme Court was free to refuse to recognize *any* right of Petitioner or to completely immunize the news media in right of publicity actions without raising a federal question. Nevertheless, Petitioner attempts to create the illusion that this case involves a conflict between an Ohio common law right and the First Amendment when no such conflict exists. Simply stated, the Ohio Supreme Court recognized a "right of publicity" in Petitioner, a public performer, as ancillary to Ohio's long established right of privacy. The court at the same time recognized that in the State of Ohio there exists a qualified privilege for Respondent, a member of the news

[2] At some later date when this Court articulates the minimum federal standard to be applied in right of publicity cases, it should find that the second basis upon which a performer may defeat the media privilege in Ohio is unconstitutional. Since under these facts the Ohio court did not defeat the privilege afforded Respondent, the case is not an appropriate one to consider the constitutionaltiy of the "intent to injure" standard adopted by the Ohio court.

media, to report the public presentation of a performer's act so long as the report constitutes news use and is not made with the intention to injure the performer.

Petitioner, being a "maker" and not a disseminator of news, neither has nor is claiming to have any First Amendment or other federal right that has been violated. Petitioner's complaint is that the Ohio court in *seeking guidance* from First Amendment decisions of this Court adopted for Ohio a more liberal news media privilege than is arguably required by the decisions of this Court. Petitioner seeks to transmogrify the Ohio court's decision approving the rationale of certain federal opinions into a ruling made under compulsion of those opinions. Such tortured reasoning does not create a conflict between Ohio common law and First Amendment rights. This absence of conflict alone disposes of this appeal.

Petitioner places great emphasis on the libel case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), suggesting that the narrowing of the public interest test in libel cases involving private individuals calls into question the Ohio court's reliance on the *rationale* of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in formulating a privilege applicable to right of publicity cases arising under Ohio law (Brief for Petitioner, p. 27). Petitioner conveniently ignores the fact that *Gertz* itself holds that the states in developing their common law are free of federal restraint provided they do not restrict the news media more than permitted by the minimum standards of First Amendment protection sanctioned by this Court. This too defeats Petitioner's finely spun argument.

Petitioner seeks to have this Court set not the minimum but rather absolute protections which the states in developing their common law may afford the news media. Petitioner would require this Court's affirmative participation in the formulation of state common law rights. Two

facets of the relief he seeks emphasize this. First, Petitioner urges that this Court should adopt absolute (not minimum) First Amendment standards applicable to the relationship of public performers and the media (Brief for Petitioner, p. 33). Second, Petitioner prays that this Court not only reverse the decision of the Ohio Supreme Court, but also that the case be remanded directly to the trial court. *Id.* Petitioner, in one blinding flash, seeks to make this Court a general appellate court for the states in common law cases. Such is not the function of this Court, and the proper disposition of the case is to dismiss the writ of certiorari as improvidently granted.

Finally, the news media privilege granted by the Ohio Court is neither novel, unusual nor inconsistent with the First Amendment freedoms so essential to our free society. It constitutes an extension to right of publicity cases of the news media privilege traditionally applied in Ohio right of privacy cases. It is further consistent with the news media privilege applied by other state and federal courts in other right of publicity cases and with the First Amendment decisions of this Court. Any less of a news media privilege would violate the First Amendment.

While conceding that Respondent has the "privilege and right to report newsworthy events of public interest," Petitioner argues that the scope of the privilege applied by the Ohio court results in "virtual total immunity" for the media in right of publicity cases (Brief for Petitioner, pp. 9-10, 13). Such is not the case. Petitioner is protected against both non-news use of his public performance by the media as well as the use of his performance in a *news* context with the intent to injure him. In fact, the latter basis for defeating the privilege adopted but not applied under the facts of this case is more than that to which Petitioner is constitutionally entitled.

II. This Case Should Be Dismissed For Want of a Federal Question.

A. The Ohio Supreme Court decision rests on adequate and independent state grounds.

It is fundamental that the development of common law is the concern of state, not federal, courts. Implicit in the power of the state courts to recognize new common law rights is the power to define the parameters of those rights. In the instant case the power of the Ohio Supreme Court to recognize a cause of action for invasion of the right of publicity carries with it the unabridged right to delineate the prerequisites to such a claim and the privileges which constitute defenses thereto.

This case was one of first impression under the laws of Ohio. In considering Petitioner's claim, the Ohio Supreme Court recognized the right of publicity as but one facet of Ohio's right of privacy and, like the right of privacy, not absolute. 47 Ohio St. 2d at 231-32, 351 N.E.2d at 459-60. The court further recognized specific affirmative defenses which, under Ohio law, may be asserted to defeat the right of publicity. The court held that a performer may abandon the right by "effectively dedicating it to the public" or by failing to give "reasonable notice to the public." 47 Ohio St. 2d at 232, 351 N.E.2d at 460. The Ohio court further recognized that in cases involving the news media the right of publicity must be subject to the media's "privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity . . ." 47 Ohio St. 2d at 224, 351 N.E.2d at 455 (syllabus 3).

In defining the affirmative defenses which apply to this newly recognized right, the Ohio Supreme Court was properly exercising its function as the sole arbiter of state law. This Supreme Court has neither the responsibil-

ity for the development of Ohio law nor the power to interfere with the limitations placed by the Ohio Supreme Court on common law causes of action unless some federal right of Petitioner is infringed.

> As a general rule, the highest court of a state may administer the common law according to its own understanding and interpretation, without liability to a review in the United States Supreme Court, unless some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied. 36 *C.J.S. Federal Courts* §268 at 739 (1960).

This Court, in *American Ry. Express Co. v. Kentucky*, 273 U.S. 269 (1927), acknowledged the role of the state courts in matters of common law. In declining to reverse a decision of the Court of Appeals of Kentucky, this Court held:

> As there was no controlling statute the state court necessarily determined the rights and liabilities of the parties under the general rules of jurisprudence which it deemed part of the law of Kentucky and applicable in the circumstances. It went no further. No earlier opinion was overruled or qualified and no rule was given any retroactive effect. *Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common.* *Id.* at 272 (emphasis added).

Similarly, in *Fairport, Painesville & Eastern R.R. Co. v. Meredith*, 292 U.S. 589 (1934), this Court declined to review the doctrine of last clear chance as applied by the Ohio courts. Appellant argued that the holding with respect to the doctrine was contrary to the great weight of American authority. This Court ruled, however, that it was precluded from considering appellant's contention as the case concerned a matter of Ohio common law and presented no federal question for review.

> The federal Safety Appliance Act . . . imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law. *Id.* at 598.

Other decisions of this Court affirm the paramount authority of the states in matters of common law. *See, e.g. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Marketing Ass'n*, 276 U.S. 71, 89 (1928) (". . . a State may freely alter, amend or abolish the common law within its jurisdiction."); and *Regents of Univ. System of Georgia v. Carroll*, 338 U.S. 586 (1950).

This Court has consistently held that its initial responsibility in reviewing any case from a state court is to ascertain "whether that court's decision 'might' have rested on a nonfederal ground, for if it did we must decline to take jurisdiction." *Ellis v. Dixon*, 349 U.S. 458, 459 (1955). If the Court is "unable to say with any degree of certainty" that a judgment is based on a federal right, it will decline to review the case, since the "Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, . . ." *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194, 196-97 (1965). The party seeking review must demonstrate to the Court that it does indeed have jurisdiction of the case. *Id.* Unless the opinion of the state court indicates that the court " 'felt constrained to rule as it did' " or that it was ruling " 'under compulsion of federal law' ", this Court will defer to adequate and independent

state grounds for the decision. *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 492 (1965).

In the instant case the syllabus of the decision of the Ohio Supreme Court is the official opinion of the court and states the law of the case. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967). This Court has recognized that the Ohio Supreme Court "speaks as a court only through the syllabi of its cases". *Beck v. Ohio*, 379 U.S. 89, 93 n.2 (1964). Matters outside the syllabus are not to be regarded as decision since "only the syllabus necessarily carries the approval of that court." *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 441 (1952). Only when the accompanying opinion unequivocally states that the Ohio court is prohibited by federal law from reaching any conclusion other than that contained in the syllabus will this Court exercise federal question jurisdiction. *Id.* at 443.

Petitioner assumes that the privilege applied by the Ohio court was not one of state law but of federal law, and that the Ohio court felt compelled by federal law to deny recovery to Petitioner (Brief for Petitioner, p. 10 n. 2). However, the syllabi in this case in no manner suggest that the Ohio court felt it was prohibited from granting recovery to Petitioner. The deliberate lack of reference in the syllabi to the First Amendment indicates that the court did not feel constrained by federal law but rather that it looked to general free press principles for guidance in formulating the state law privilege.

Nor does the accompanying opinion of Justice Stern suggest that the court "felt constrained" by the First Amendment to rule as it did or that it acted "under compulsion of federal law" in prohibiting Petitioner from recovering. Rather, the opinion suggests that the Court is recognizing a new common law right subject to specific

conditions and privileges which afford proper protection to the press.

Respondent submits that it is apparent from a consideration of the foregoing authorities and the syllabi and opinion of the Ohio court that the writ of certiorari in this case was improvidently granted and that the decision of the Ohio Supreme Court should be allowed to stand as the Ohio court's expression of the proper defenses to be applied to common law right of publicity cases arising under the laws of Ohio.

B. In defining the scope of common law rights the Ohio Supreme Court may look for guidance to decisions of this Court.

Petitioner states his primary objection to the Ohio Supreme Court's decision as follows:

> Petitioner contends that the Ohio Supreme Court's reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *for guidance* is erroneous. (Brief for Petitioner p. 10) (emphasis added).

Respondent submits that the contrary is true. A state supreme court in formulating defenses to common law causes of action is free to consider pronouncements of this Court, particularly in the First Amendment area.

In this case the Ohio Supreme Court adopted the basic rationale of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as applied in *Time, Inc. v. Hill, supra*, that "freedom of the press inevitably imposes certain limits upon an individual's right of privacy." 47 Ohio St. 2d at 233, 351 N.E.2d at 460. The Ohio court concluded that the reasoning of this Court in *Time, Inc. v. Hill* was sound and that a similar privilege should apply to right of publicity cases arising under Ohio law:

> Just as the press was held to be privileged to report matters which would otherwise be private, if they are of public concern, so too, it must be held privileged when an individual seeks to publicly exploit his talents while keeping the benefits private. The same privilege exists in cases where appropriation of a right of publicity is claimed . . . . 47 Ohio St. 2d at 234, 351 N.E.2d at 461.

The Ohio Supreme Court's reliance on *Time, Inc. v. Hill* and *New York Times Co. v. Sullivan* for guidance in formulating the rule of law for Ohio with respect to privacy claims parallels the use made by other state courts of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), in granting state news media defenses to libel claims brought by private individuals. Guided by this Court's pronouncement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual", several state courts have found the rationale of the disapproved *Rosenbloom* decision persuasive. They have accordingly adopted a *Rosenbloom* or modified *Rosenbloom* test to be applied in their states in defamation cases involving private individuals. In *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo.), *cert. denied*, 423 U.S.1025 (1975), the Colorado Supreme Court concluded that the simple negligence test allowed by *Gertz* would cause a chilling effect upon the news media and "'would create a strong impetus toward self-censorship [by the news media], which the First Amendment cannot tolerate.'" *Id.* at 458 (quoting from *Rosenbloom v. Metromedia*).

Similarly, the Indiana Court of Appeals, in *AAFCO Heating and Air Conditioning Company v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976), determined that the *Rosenbloom* standard is the appropriate standard to govern defamation claims brought under the laws of Indiana. Other similar cases include *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975), where the Supreme Judicial Court of Massachusetts ruled that punitive damages may not be awarded in a defamation action on *any* state of proof, even though permissible under *Gertz; Peagler v. Phoenix Newspapers, Inc.*, 26 Ariz. App 274, 547 P.2d 1074 (1976); and *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569 (1975).

It is the function of this Court in the First Amendment area to insure that no state court denies the minimum constitutional protection required by the First Amendment. So long as they meet minimum federal constitutional standards, the state courts in right of publicity cases have the freedom permitted them under *Gertz* to delineate the protection to be afforded the press under state law.

C. Any decision by this Court on the merits would constitute merely an advisory opinion.

Petitioner has asked this Court to intervene in a state matter and formulate specific First Amendment standards to govern the relationship between public performers and the broadcast media (Brief for Petitioner, p. 29). However, under the facts of this case an opinion rendered by this Court on First Amendment issues would be merely advisory. This Court has always held that it will not issue advisory opinions, even in cases where it believes that the lower court has wrongly decided a federal question, if an adequate nonfederal ground for the lower court's decision also exists. *Murdock v. Memphis*, 87 U.S. 590, 634-636 (1874). Since the decision of the

Ohio court in this case was founded on state law, the resolution of the competing interests of performers and the press under federal law is not properly an issue.

The words of Justice Jackson contained in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), are instructive:

> *This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.* (citations omitted) * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. *We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion.* (emphasis added).

This is a most inappropriate case in which to advise the state courts on the minimum First Amendment standard applicable to right of publicity cases. First, the facts of this case have such narrow and singular application that a decision on the merits would have little, if any, general application. The news media has no interest in reproducing lengthy segments of an individual's performance, and in only the most unusual case (such as exists here) will any substantial portion of a performance be used in a news context. Petitioner attempts to intrigue this Court by asserting that the interests of public performers and personalities are being markedly limited by the privilege applied by the Ohio court (Brief for Petitioner, p. 13). This assertion could not be farther from

the truth. Virtually all right of publicity complaints raised by performers relate to the commercial use of their name or likeness. It is the *commercial* use which is the bane of performers, not legitimate news use which the vast majority of performers seek and benefit from.[3]

Second, performers such as the Petitioner have sufficient means to prevent media coverage of their performances if they really do not want coverage. In performers' contracts with promoters, the promoters can be required to include explicit prohibitions against mechanical reproductions on tickets and programs. If a performer *sells* his performance to a promoter as Petitioner did in this case, the performer can, at the contractual stage, determine the conditions and limitations to be placed on audience reproduction of the performance.

Thirdly, Respondent's use of the film clip of Petitioner's act was *de minimis*. In *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970), a Federal District Court found that even *commercial* use of a forty-five second film clip of plaintiff's entire musical performance did not provide the basis for a claim under New York's right of privacy statute. The Court's holding in *Man*, *Id.* at 53, is directly in point here:

> Finally, the incidental use of plaintiff's forty-five second performance in defendants' motion picture of this public event is surely *de minimis* [sic]. Cf. University of Notre Dame du Lac v. Twentieth Century Fox Film Corp., *supra;* Damron v. Doubleday, Doran & Co., 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct., N.Y. Co. 1928), aff'd 226 App. Div. 796, 234 N.Y.S. 773 (1st Dep't 1929).

Although the Ohio Supreme Court did not have to rely upon the *de minimis* theory in dismissing Petitioner's

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[3] In this case the very favorable publicity given Petitioner by Respondent could only enhance his career and the marketability of his act. (*See* App. p. 12).

claim since the news media privilege precluded recovery under the facts of this case, the court nevertheless suggested that Petitioner's claim was insubstantial. 47 Ohio St. 2d at 234 n. 5, 351 N.E.2d at 461 n. 5.

It is difficult to imagine a less appropriate case for this Court to advise state courts as to minimum federal constitutional standards which must be afforded the press in right of publicity claims arising under state common law. For this additional reason, Respondent suggests that the writ of certiorari to the Ohio Supreme Court should be dismissed as improvidently granted.

III. The News Media Privilege Recognized By the Ohio Supreme Court Is Neither Novel, Unreasonable Nor Inconsistent With Federal Constitutional Principles.

A. The privilege afforded the press by the Ohio Supreme Court is consistent with the news media privilege traditionally recognized in Ohio and other jurisdictions.

In Ohio the media's privilege to report on matters of general and public interest did not begin with *New York Times Co. v. Sullivan*. Since 1938 state courts in Ohio have applied a news media privilege to disseminate matters of public interest as a defense to invasion of privacy claims. In *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 69, 10 Ohio Op. 338, 341 (C.P. 1938), an Ohio court recognized the following privilege as a defense to a right of privacy claim:

> [The right of privacy] does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the publication would be of a public benefit, as in the case of a candidate for public office.

Two years later this privilege was again applied in *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 431, 18 Ohio Op. 372, 379-80 (C.P. 1940):

> All authorities which recognize "right of privacy" as a legal right for the violation of which there is a legal remedy agree upon certain fundamentals namely:
>
> (a) The right of privacy does not prohibit publication of matter which is of public or general interest, . . .

In its detailed analysis of the competing societal and constitutional interests present in this case, the Ohio Supreme Court reasoned that the "public interest" privilege afforded the press in the more traditional privacy actions should also be available as a defense to right of publicity claims. Thus, the decision of the Ohio Supreme Court merely reaffirmed the general theory of news media privilege that has been applied for forty years as a defense to privacy claims in Ohio, and extended that privilege to the newly recognized right of publicity.

The privilege applied by the Ohio court is also consistent with news media privileges applied to right of publicity claims arising in other jurisdictions. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (S. Ct. 1968), *aff'd*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969), a New York court protected the publication of a biography of Howard Hughes against a claim that his right of publicity was violated.

> The publication of a biography is clearly outside the ambit of the "commercial use" contemplated by the "right of publicity" and such right can have no application to the publication of factual material which is constitutionally protected. *Just as a public figure's "right of privacy" must yield to the public interest so too must the "right of publicity" bow where such*

conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest. Id. at 6, 294 N.Y.S. 2d at 129 (emphasis added).

This news media privilege has been applied to appropriation cases in New York regardless of whether the basis of the claim is New York's right of privacy statute or the common law right of publicity. *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970) (plaintiff denied recovery on free press grounds for the *commercial* use of his forty-five second musical performance); *Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (S. Ct. 1972) (unauthorized taping and commercial distribution of an interview with Elvis Presley does not constitute violation of his right of publicity); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (S. Ct. 1968) (commercial sale of presidential poster of comedian Pat Paulsen privileged as against right of publicity claim).[4]

[4] Petitioner has sought to distinguish *Man v. Warner Bros., Inc.* and similar New York cases by arguing that the claims were governed by New York's right of privacy statute and not a common law right of publicity. (Brief for Petitioner, p. 10 n. 1). This distinction is inaccurate for New York Courts have held that both the statutory right of privacy *and* the common law right of publicity are limited by an identical free press privilege. *Paulsen v. Personality Posters, Inc., supra* at 450-51, 299 N.Y.S. 2d at 508-509; *Rosemont Enterprises, Inc. v. Random House, Inc., supra* at 6, 294 N.Y.S.2d at 129.

B. The privilege applied by the Ohio court is consistent with First Amendment principles articulated by this Court.

In *Time, Inc. v. Hill* this Court acknowledged that freedom of the press imposes certain necessary limitations on the right of privacy. The Court reasoned that a broadly defined freedom of the press is constitutionally required to provide the breathing space essential to fruitful exercise of this most important First Amendment freedom. 385 U.S. at 389. These principles were recently reaffirmed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), where the Court concluded that the First Amendment "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records" even if such disclosure places in the public domain delicate and private matters.[5]

Petitioner's contention that *Gertz v. Robert Welch, Inc.* and its progeny call into question the Ohio court's use of the rationale of *Time, Inc. v. Hill* in a state right of publicity case is unsound. In *Gertz*, this Court held that the actual malice standard of *New York Times Co. v. Sullivan* abridged the states' legitimate interest in providing a legal remedy for *falsehoods* injurious to the reputation of a private individual. 418 U.S. at 345-46. The *Gertz* court reemphasized the paramount importance of a free press as the foundation of a free society, but rec-

[5] The *Cox* decision suggests that *truthful* reports of matters of public interest will be afforded the strongest constitutional protection:

> [T]he constitutional necessity of recognizing a defense of truth is equally implicit in our statement of the permissible standard of liability for the publication or broadcast of defamatory statements whose substance makes apparent the substantial danger of injury to the reputation of a private citizen, 420 U.S. at 499. (Powell, J. concurring).

ognized that in a free society there is a strong state interest in protecting the good name and dignity of the individual. As expressed by Justice Stewart in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring):

> [The law of defamation] reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system.

The *Gertz* decision was founded on the Court's desire to forge an accommodation of these sometimes competing, essential interests. While Petitioner may have certain commercial rights in his "human cannonball" act, they hardly qualify as essential to "any decent system of ordered liberty". In this case Petitioner has gained the right of recovery against those making commercial use of his name and likeness. *Commercial* appropriation is the foundation of the right of publicity and is its most important facet. The privilege articulated by the Ohio court does not affect this aspect of the right of publicity.

The Ohio Supreme Court recognized the significant distinction between defamation claims made by private individuals and right of publicity claims asserted by public performers and personalities. In the Ohio court's view, there was no fundamental societal interest which required a significant abridgment of First Amendment freedoms in right of publicity cases. The court wisely reasoned that the "chilling effect" which results from inadequate free press protection in libel and false light cases would similarly affect the news media if a strong privilege were not afforded the press in defense of right of publicity claims. This chilling effect acts as an actual restraint on the press in the form of self censorship. A broadcaster who must constantly evaluate whether a jury would find his use of a performer's name or likeness "reasonably undertaken in discharge of the broadcast media's right and responsibility to inform the public of the happening of a newsworthy event" (Brief for Petitioner, pp. 30-31) will tend to limit the scope of news coverage given public performances and personalities.

Petitioner is asking this Court to (i) strip the media of the right to independently determine what constitutes news and (ii) narrowly define news so as to exclude material having entertainment value. Such action would have a profound adverse effect on the media.

> Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged. *Jenkins v. Dell Publishing Co.*, 251 F.2d 447. 451 (3d. Cir), *cert. denied*, 357, U.S. 921 (1958) (footnotes omitted).

This Court must not second guess in each case the manner and extent of news coverage given a public event. Such interference with the function of a free press, absent some fundamental competing interest, can only encourage further attempts to narrowly define and governmentally control what constitutes news.

C. The Ohio court did not totally immunize the press from right of publicity claims.

Although the Ohio court could have granted total immunity to the media in right of publicity cases without presenting any constitutional question, the Ohio court did not do so. Rather than "immunize" the press (*See* Brief for Petitioner, p. 11), the court recognized two bases for defeating the media privilege.

The first basis, that "the actual intent . . . was to appropriate the benefit of the publicity for some non-public use," provides a standard for determining whether *news* use is made of the performer's name or likeness. Under the facts of this case, the single use on Respondent's nightly news program of a fifteen second film clip of the performance is plainly a news use. *See Zacchini v. Scripps-Howard Broadcasting Company, supra* at 235, 351 N.E.2d at 461. Should the media, in a different case, broadcast on a commercial program a concert given by a professional entertainer, that use would be sufficient to establish intent to appropriate the benefit of the publicity for a non-privileged use.

The second basis for defeating the privilege, that "the actual intent of the media was to injure the individual," comports with the express malice limitation long applied by the Ohio courts in defamation actions.[6] Under Ohio

[6] Although it is unnecessary to reach the issue at this time, Respondent believes that the "intent to injure" standard allows the imposition of liability upon the press for the publication of even truthful reports if done with "ill-will" or "express malice". This Court has rejected the concept that liability can be imposed upon a mere showing of dislike or ill-will towards a plaintiff. *Garrison v. Louisiana*, 379 U.S. 64 (1964). Petitioner has unfortunately confused the concept of "intent to injure" or "express malice" with that of "actual malice" as defined by this Court. While Petitioner characterizes the Ohio court's opinion as allowing recovery only upon a showing of "actual malice" (*See, e.g.*, Brief for Petitioner, p. 9), it is apparent upon a careful reading of the opinion that a lesser standard was applied.

law the privilege of the press to publish and disseminate news may be lost if the publication is made with express malice, that is, out of a sense of ill will, hatred or revenge. 34 OHIO JUR. 2d *Libel and Slander* §58 at 224 (1958). Ohio courts have long considered and applied this express malice test, which, like the Ohio Supreme Court's actual intent test, is a subjective one. *E.g., Liles v. Gaster*, 42 Ohio St. 631 (1885); *Torski v. Mansfield Journal Co.*, 100 Ohio App. 538, 137 N.E.2d 679 (1956). A court would have no more difficulty applying this basis for defeating the privilege in right of publicity cases than it has had in applying the express malice test in libel actions. For example, had Respondent's script alleged that Petitioner's act was a fraud, and had the film strip been edited so as to falsely show that Petitioner leaves the "cannon" prior to the explosion with the assistance of a spring-gun mechanism, Respondent's intent to injure Petitioner would be evident.

The Ohio court has not seriously limited Petitioner's rights by applying a privilege which recognizes the paramount concern our society has for freedom of the press. In the words of the Supreme Court of Ohio:

> [T]he primary value which one society places upon the freedom of speech and of press requires that we reject [Petitioner's] viewpoint. The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. *No fixed standard which would bar the press from reporting or depicting an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires.* 47 Ohio St. 2d at 235, 351 N.E.2d at 461. (emphasis added).

As the foregoing analysis establishes, the decision of the Ohio Supreme Court in this case extending to right of publicity cases the rule pertaining to privacy cases since 1938 is neither novel nor unreasonable and is consistent with fundamental free press concerns, both state and federal.

IV. Any Remand For Further Proceedings In This Case Must Be to the Ohio Supreme Court.

Petitioner's position that the United States Supreme Court can and should define the specific news media privilege to be applied under Ohio common law constitutes the single most novel proposition in his brief. His suggested procedural disposition of the case, however, is only slightly less extraordinary. Petitioner suggests that this Court deal directly with the Ohio Court of Common Pleas if any remand is necessary. While this Court may remand a federal case to either a Circuit Court of Appeals or a District Court, the Court's practice has always been to remand state cases to the highest state court for further proceedings not inconsistent with the opinion of the Court. Until the instant case, it had always been accepted that a state supreme court has the right and power to control proceedings in the inferior courts of that state. As stated in 14A F. Poore, CYCLOPEDIA OF FEDERAL PROCEDURE §69.77 at 149 (3d ed. 1965):

> The state court is not required to submit the cause to new proceedings, if it has power to make a new judgment conforming to what was decided. The enforcement of the mandate upon lower state courts is within the power of, and will be left in the first instance to, the highest state court whence came the cause, and to which it was remanded on reversal for further proceedings. (footnotes omitted).

See Southern Ry. Co. v. Kentucky, 284 U.S. 338, 341 (1932), *In re Royall*, 125 U.S. 696, 697 (1888).

If this Court requires any further proceedings in this matter, the cause should be remanded to the Ohio Supreme Court in the first instance for disposition in a manner consistent with this Court's mandate. Thus, if this Court should choose to establish advisory federal constitutional standards applicable to right of privacy claims of this nature, the Ohio Supreme Court should be given an opportunity, *inter alia*, to (i) choose to expand upon the minimum federal standard for protection of the free press *(See Gertz v. Robert Welch, Inc., supra)* or (ii) confirm that state common law or constitutional principles require a broader news media privilege in Ohio than the minimum allowed by this Court. *(See, e.g., AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc., supra)*.

In accordance with well settled principles of judicial review, this Court should, in fact, remand the case to the Ohio Supreme Court before establishing any such advisory standard if the Court believes such standard must be defined in the context of this case. It is Respondent's position that the Ohio Supreme Court's decision is clearly one of state law. If this Court disagrees, it must ascertain that the decision is in fact grounded on federal law before treating any federal question. The Ohio Supreme Court is the appropriate state court to consult as to the basis for its decision. *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1965), *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). *See generally*, Note, 62 COLUM. L. REV. 822 (1962). Unless the Ohio Supreme Court advises that its decision was compelled by its view of federal law, this Court should not act.

Thus, if this Court determines that further proceedings are required in this case, it should remand the case to the Ohio Supreme Court for disposition in accordance with its mandate.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the writ of certiorari should be dismissed as improvidently granted or, alternatively, that the opinion of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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